STATE OF MICHIGAN

COURT OF APPEALS

WENDY PIOTROWSKI, Plaintiff-Appellant,	UNPUBLISHED May 17, 2012
v	No. 303772 Washtenaw Circuit Court
DEBORAH A. LABELLE, Defendant-Appellee.	LC No. 10-001086-NM

Before: FITZGERALD, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In 1996, defendant and nine other attorneys filed a proposed class action lawsuit, *Neal, et al v MDOC*, lower court case no. 96-6986-CZ, on behalf of female prisoners who were subjected to sexual abuse and misconduct by male prison staff during their incarceration in Michigan state prisons. The trial court approved defendant as one of the ten attorneys to represent the class of plaintiffs in the class action lawsuit against the Michigan Department of Corrections ("MDOC"). Plaintiff was a class member but never took action to partake in the large settlement, and so subsequently sued defendant for legal malpractice. The trial court granted defendant's motion for summary disposition, and we now affirm.

I. FACTS AND PROCEEDINGS

In 2001, plaintiff contacted defendant regarding her allegation that she had been raped on multiple occasions while incarcerated in a Michigan state prison in 1998. In response, defendant provided plaintiff with a class member questionnaire regarding the *Neal* class action, which plaintiff completed and submitted to defendant. From August 21, 2001, through January 18, 2002, plaintiff and defendant's law office corresponded regarding the status of her offender's December 20, 1999, plea to charges of criminal sexual misconduct in the fourth degree. On January 18, 2002, defendant's legal assistant mailed plaintiff a letter regarding the *Neal* case, advising plaintiff that the status of that plea "would make a large difference should you chose [sic] to pursuit [sic] a civil suit against him. . . . We encourage you to consider all of these factors before taking any further action. Please feel free to contact me should you have any other questions."

From October 6, 2003, through June 22, 2005, plaintiff and defendant exchanged intermittent communication regarding information that plaintiff needed to provide as a class member. On July 5, 2005, defendant's law office sent plaintiff a letter updating her on the status

of the *Neal* case. The letter also responded to the questions that plaintiff asked as part of her member questionnaire regarding her ability to proceed with her own case against the MDOC:

> First, you were required to 'opt-out' or, indicate that you did not wish to participate, of this class action by May, 2003. Anyone who did not opt out prior to that date may be bound to their participation in the class action. The second consideration is that [sic] the applicable statute of limitation. A lawsuit of this type typically must be filed within three years of the date of the incident. Because the incident you were involved in happened in 1998, it would be difficult for you to file an individual action, given the statute of limitations.
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> Please let me know if you have any further questions.

In June 2009, the *Neal* parties reached a settlement agreement. Thereafter, on July 15, 2009, the trial court granted preliminary approval of the settlement agreement, and approved the form and method for class notice of the settlement. The plan of allocation of settlement provided: "In order to be entitled to participate in the settlement a claim must fit the definition of one of the pools described below *and an eligible class member must* fill out a claim form." Specifically, the trial court approved the following notice methods:

> Notice of this plan of allocation, together with Notice of Settlement, the preliminary approval of Settlement Agreement and Claims Forms, shall be mailed no later than July 21, 2009, to the last known address of each class member on class counsel's mailing list and to all last known addresses of released class members incarcerated since March, 1993, based upon information provided by the Department on July 9, 2009.
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> The Michigan Department of Corrections shall conspicuously post a copy of the Notice and summary of the settlement, in the public areas of each facility, camp and center housing female prisoners in Michigan and two conspicuous locations within each of the female housing units with a mechanism to obtain claim forms.
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> A summary of the Notice and summary of the Settlement with a method for obtaining claim forms shall be published in the *Grand Rapids Press, Detroit Free Press, Detroit News* and *Michigan Chronicle*, for a period of two weeks beginning on July 21, 2009. A website shall be established by July 21, 2009, which class members shall be able to review all proposed settlement documents and download claim forms. www.nealclassaction.com.
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> * * *
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> Any class member wishing to participate in the class member participation or pool award process *MUST SUBMIT A FORM THAT IS RECEIVED BY CLASS COUNSEL NO LATER THAN AUGUST 14, 2009*.

Plaintiff became aware of the *Neal* settlement shortly before July 21, 2009. On July 21, 2009, plaintiff went to defendant's law office and spoke with defendant's paralegal, Mr. Goncolvo. According to plaintiff, Goncolvo informed her that defendant would mail her the claim forms relating to the *Neal* settlement. Plaintiff then gave defendant's law office her current mailing address. According to plaintiff, Goncolvo never informed her about the August 14, 2009, filing deadline.

On that same day, defendant published and mailed notice of the *Neal* settlement in compliance with the trial court's order regarding notice, which included mailing the settlement notice and claim forms to plaintiff at the mailing address that she had provided. According to defendant, the postal service returned as undelivered a number of the notice packets that defendant mailed to other individual class members at their last known addresses, but the postal service never returned plaintiff's notice packet to defendant as undelivered.

Plaintiff returned to defendant's law office on October 5, 2009, seeking to file a claim to receive a portion of the settlement proceeds. Defendant advised plaintiff that the August 14, 2009, filing deadline had expired and it was now too late to file a claim. Plaintiff claimed that she never received the claim forms and, thereafter, brought the matter before the trial court, requesting to be deemed eligible to participate in the *Neal* settlement. On November 9, 2009, defendant was notified that her request was denied because she "failed to follow the procedure outlined in the Plan of Allocation of Settlement Proceeds."

Plaintiff thereafter sued defendant for legal malpractice, arguing that defendant breached her duty to plaintiff in the following manner:

> a. In failing to provide [plaintiff] with a claim form on July 21, 2009;
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> b. In failing to inform [plaintiff] on July 21, 2009 of the deadline of August 14, 2009 for submitting the claim form;
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> c. In committing other acts and/or omissions that will be more specifically identified upon completion of discovery.

Defendant ultimately moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), arguing that plaintiff's complaint did not demonstrate that defendant breached a duty to plaintiff because defendant provided plaintiff the notice that she was entitled to by court order, and there was no dispute plaintiff knew of the settlement. Plaintiff's answer to the motion was that she had a more direct relationship with defendant than other class members, and so defendant's duty to her went beyond what was owed towards normal class members. As noted, the trial court granted defendant's motion, holding in part that defendant did not breach any duty owed to plaintiff.

II. ANALYSIS

"We review de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). In granting

defendant's motion for summary disposition, the trial court did not specify the subrule pursuant to which it was granting summary disposition. However, while defendant's motion asserted subrule (C)(7) as a basis for summary disposition, the record offers no indication that any release, payment, statute of limitations, et cetera, barred plaintiff's claim. MCR 2.116(C)(7). Thus, summary disposition was not granted under MCR 2.116(C)(7). *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), and thus is a proper rule to challenge whether a legal duty exists. However, because the trial court looked to evidence outside the pleadings, MCR 2.116(C)(8) was also not the appropriate rule to grant defendant's motion. Instead, MCR 2.116(C)(10) was the proper court rule because evidence was used in support of the motion.

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the case. The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists." *McGrath v Allstate Ins Co*, 290 Mich App 434, 438 n 1; 802 NW2d 619 (2010) (citation omitted). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004); see also MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Healing Place at North Oakland Med Center v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007).

"In order to state an action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements: '(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged.'" *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995) (citation omitted); see also *Kloian*, 272 Mich App at 240. The existence of an attorney-client relationship establishes the existence of a duty that the attorney owes to the client "to avoid negligent conduct." *Simko*, 448 Mich at 655. In other words, "[i]f there is an attorney-client relationship, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law." *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001); see also *Simko*, 448 Mich at 655-656.

For purposes of this opinion, we will assume that an attorney-client relationship existed between plaintiff and defendant. *Kloian*, 272 Mich App at 240. This allows us to address the pivotal issue presented, which is whether the interactions between plaintiff and defendant imposed on defendant a "higher duty" towards plaintiff as compared to other class members. *Simko*, 448 Mich at 655-656.

Where an attorney-client relationship exists, "the issue is not whether a duty existed, but rather the extent of that duty once invoked." *Simko*, 448 Mich at 656. In general, "[i]t is well established that '[a]n attorney is obligated to use reasonable skill, care, discretion and

judgment'" in her representation. *Id*. (citation omitted). "An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law[,]" and "is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id*. A duty is not imposed "on attorneys to do more than that which is legally adequate to fully vindicate a client's rights." *Id*. at 657 (quotation omitted).

MCR 3.501 is the court rule governing class actions. "MCR 3.501 was promulgated to address the special problems peculiar to class actions." *Bolt v Lansing (On Remand)*, 238 Mich App 37, 55; 604 NW2d 745 (1999); see also *Tinman v Blue Cross and Blue Shield of Mich*, 264 Mich App 546, 557; 692 NW2d 58 (2004). Specifically, MCR 3.501(C) governs the requirements for service of notice on class members, *Bolt*, 238 Mich App at 56, and MCR 3.501(C) provides, in relevant part:

> (1) *Notice Requirement.* Notice shall be given as provided in this subrule to persons who are included in a class action by certification or amendment of a prior certification . . . .
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> (2) *Proposals Regarding Notice.* The plaintiff shall include in the motion for certification a proposal regarding notice covering the matters that must be determined by the court under subrule (C)(3).
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> (3) *Action by Court.* As soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent.
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> (4) *Manner of Giving Notice.*
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> (a) Reasonable notice of the action shall be given to the class in such manner as the court directs.
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> (b) The court may require individual written notice to all members who can be identified with reasonable effort. In lieu of or in addition to individual notice, the court may require notice to be given through another method reasonably calculated to reach the members of the class. Such methods may include using publication in a newspaper or magazine; broadcasting on television or radio; posting; or distribution through a trade or professional association, union, or public interest group.
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> (c) In determining the manner of notice, the court shall consider, among other factors,
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> (i) the extent and nature of the class,
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> (ii) the relief requested,
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> (iii) the cost of notifying the members,

(iv) the resources of the plaintiff, and

(v) the possible prejudice to be suffered by members of the class or by others if notice is not received.

The trial court set forth the settlement notice procedures pursuant to MCR 3.501(C), requiring class counsel to mail notice of the settlement to the last known address of each class member by July 21, 2009, to publish notice of the settlement in the specified newspapers for a period of two weeks beginning on July 21, 2009, and to create a website designed to aid class members in filing their claims.

Plaintiff concedes that defendant satisfied the notice requirements as established by the trial court, which included mailing the claim forms to the last known address of each class member, and discharged her duties to plaintiff as a class member. But, according to plaintiff, a "higher duty" arose out of plaintiff's "direct and ongoing relationship" with defendant. As the trial court correctly held, whether defendant owed plaintiff a higher duty than she owed to the rest of the plaintiff class was a question of law. *Simko*, 448 Mich at 655. We agree with the trial court that plaintiff failed to establish that defendant owed her a special or higher duty, and, thus defendant's motion for summary disposition was properly granted because there was no dispute that defendant otherwise acted in accordance with the duties imposed on her as class counsel.

Defendant did what was legally adequate and required of her by informing all class members of the settlement. She acted consistent with prevailing Michigan law, MCR 3.501, and the court order governing notice in this case. Her duty was to use reasonable skill, care, discretion and judgment to the class she represented, and not to use extraordinary diligence to plaintiff who was a member of the class. *Simko*, 448 Mich at 655-656. Additionally, plaintiff cites no authority to support the proposition that a class counsel is held to a higher duty to individual class members if contact with them is somehow made. Such a proposition would contravene the fundamental notion that "class counsel's obligations run to the class as a whole[.]" *Olden v LaFarge Corp*,[1] 472 F Supp 2d 922, 931 (ED Mich, 2007); *Heit v Van Ochten*, 126 F Supp 2d 487, 494 (WD Mich, 2001) ("[T]he duty owed by class counsel is to the entire class and is not dependent on the special desires of named plaintiffs." (quotations omitted)). It would also contravene the general duties owed by attorneys to their clients because plaintiff is seeking to impose on defendant a duty to do more than what was required.

A case from the United States Court of Appeals for the Third Circuit addressed this issue under very similar circumstances. *Zimmer Paper Prod, Inc v Berger & Montague, PC*, 758 F2d 86 (CA 3, 1985), cert den 474 US 902; 106 S Ct 228; 88 L Ed 2d 227 (1985). In *Zimmer*, the plaintiff was a plaintiff class member to a class action lawsuit. *Id*. at 88. The plaintiff in *Zimmer* failed to file a claim for its share of the settlement proceeds, and subsequently sued its class

[1] "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Neither party has provided any Michigan law on this precise issue.

counsels for "breach of their fiduciary duties and [] negligence in failing to ensure that . . . [the plaintiff] was notified[]" of the settlement of the action. *Id*. at 89. The plaintiff contended "that class counsel breached its fiduciary duty by not suggesting or undertaking more thorough notice procedures than the court ordered[.]" *Id*. at 88. The plaintiff "argue[d] that regardless of compliance with due process, Rule 23,[2] a court order, and the general practice of class action notice, class counsel is personally liable for a breach of its fiduciary duty in not doing something more." *Id*. at 91 (footnote added). The district court in *Zimmer* granted the defendants' motion for summary judgment, holding "that the defendants had no duty to send notices by certified or registered mail, to employ follow-up procedures, or to establish a reserve contingency fund for late claims." *Id*. at 89.

On appeal, the Third Circuit stated that "in determining whether an attorney for a class has breached a fiduciary duty, we should afford considerable weight to the fact that he or she has done all that is generally done, all that due process requires, and all that the court ordered." *Zimmer*, 758 F2d at 91. Noting that the plaintiff cited no authority to support its proposition that "class counsel's fiduciary duty encompassed a responsibility to effect notice" by means beyond what the statute and court order required, the court highlighted the implications of such a conclusion:

> If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and . . . [statutory] notice procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim. [*Id*. at 91-92.]

The Third Circuit ultimately affirmed the district court's grant of summary judgment, holding that "where the procedure employed was customary and court-approved, . . . and where the plaintiffs have offered little support for the proposition that more was required, class counsel cannot be said to have breached their duties." *Zimmer*, 758 F2d at 93. Although *Zimmer* is not binding on this Court, we find it to be persuasive regarding defendant's duty to plaintiff in light of the duties imposed by law on attorneys. *Abela*, 469 Mich at 607; *Simko*, 448 Mich at 655-656.

Accordingly, in light of plaintiff's concession that defendant satisfied her duties of notice to the plaintiff class (including to plaintiff herself as a class member), and in light of the legal authority providing that defendant did not owe a higher duty to plaintiff than she owed to the rest of the plaintiff class, we hold that there was no genuine issue of material fact that defendant did not breach a duty owed to plaintiff. Therefore, the trial court properly granted defendant's motion for summary disposition.

[2] FR Civ P 23 is essentially the federal equivalent to MCR 3.501.

Affirmed. Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Stephen L. Borrello